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No. 08-580

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In the Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

There are no parties to the proceedings other than Respondent, Cleveland Construction Company, Inc. ("Cleveland") and the City of Cincinnati, Ohio ("the City"). Cleveland has no parent corporation and no publicly-held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

The City's Petition for a Writ of Certiorari to the Ohio First District Court of Appeals should be denied. In its Petition, the City mischaracterizes its Small Business Enterprise program ("SBE program") as being "discretionary" in its application, and as simply "tracking the use of minority-owned and women-owned subcontractors."[1] In reality, the SBE program required bidders to subcontract a specific portion of their work, and in so doing to make "good faith" efforts to racially discriminate in their selection of subcontractors. It also required bidders to provide certification of their racially discriminatory contracting efforts and the results of such efforts with their bid submittals. The City's consistently asserted panacea for the racial discrimination it required of bidders in its SBE program is that it did not award contracts to bidders based upon their degree of success in racially discriminating in their selection of subcontractors.

Contrary to the City's arguments, the fact that a bidder's degree of success in making a good faith effort to racially discriminate in subcontracting was not the 'trigger' for an award of a prime contract from the City does not insulate the SBE program from strict judicial scrutiny. The City's argument is tantamount to asserting that the SBE program is not subject to strict scrutiny because it only requires that a bidder attempt

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[1] Petitioner's Br. at 6, 8, 11, 16, 18.

to racially discriminate in the award of subcontracts, but does not require the City itself racially discriminate in its award of prime contracts.

The racially discriminatory subcontracting outreach effort required of all bidders simply can not be applied in any manner which meets constitutional muster. The SBE program is a race-conscious program for which the City conceded below it lacked a proper factual evidentiary predicate. The lower courts appropriately sustained both the as applied and facial challenges to the SBE program. The constitutional flaws of the City's SBE program bear no resemblance to the issues addressed in this Court's decision in *Parents Involved In Community Schools v. Seattle School District No. 1.* The decisions of the trial court and the First District Court of Appeals on the equal protection issues raised by this case are soundly supported by the facts and are consistent with prevailing jurisprudence, including that of this Court.[2]

STATEMENT OF THE CASE

Cleveland was the lowest bidder for the drywall contract on the project.[3] Bidders on the project were subject to the City's Small Business Enterprise ("SBE") program.[4] The City's SBE program required

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[2] *Parents Involved In Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007).

[3] App. 25a-27a; 70a.

[4] *Id.*; 195a.

"subcontracting outreach" of all bidders.[5] Bidders had to subcontract a certain percentage of their contract to "small businesses," and in doing so, the bidders were required to make a "good faith effort" to "obtain the maximum practicable participation by small, minority and women–owned business enterprises" in the subcontracted portion of their bid.[6] Prior to submitting bids, the bidders were given an "Availability Estimation" by the City which estimated the availability of minority and women drywall subcontractors in relation to the percentage in which the City indicated they should be reflected in the subcontracted portion of a bidder's bid.[7] Bidders were told by the City in a summary of the subcontracting requirements that: "Bidders should be able to include minority and female firms at the level of availability indicated," and that the City expected "the utilization of SBEs to be reflective of the availability estimates."[8] The City admitted that it lacked any factual predicate that could satisfy "strict scrutiny" review of a race-conscious program, but claimed that the SBE program was race-neutral.[9]

The sole reason Cleveland was not awarded the contract is that it did not meet the 35% subcontracting

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[5] App. 25a; 70a; 149a-152a.

[6] *Id.*; App. 84a-87a; 148a.

[7] App. 148a; 149a-152a.

[8] App. 85a; 148a.

[9] App. 81a.

requirement.[10] Instead, Valley Interior Systems, Inc., ("Valley"), was awarded the contract because it met (and in fact exceeded) the 35% subcontracting requirement, although Valley's bid was 1.2 Million Dollars higher in price than Cleveland's.[11] All of Valley's small business enterprise subcontractors were also minority business enterprises.

Cleveland filed suit on March 30, 2004 when it learned of the contract award to Valley, alleging violation of its constitutional rights to due process and equal protection under 42 U.S.C. § 1983, as well as under state law for the City's abuse of discretion in violating its own code restriction, Cincinnati Municipal Code § 321-37(c)(4).[12] Cleveland requested money damages, declaratory judgment, and temporary, preliminary and permanent injunctive relief. At the same time, Cleveland filed a motion for a temporary restraining order. The trial court denied the request for a temporary restraining order.[13] The court set the case for a hearing on Cleveland's request for a preliminary injunction, but the City filed a Notice of

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[10] App. 70a-71a. Cleveland was not informed by the City that it would not be awarded the contract in advance of the City making an award to another bidder.

[11] *Id.* A third bidder, Kite, was higher in price than Valley but also met the subcontracting requirement of the SBE program.

[12] App. 106a.

[13] *Id.*

Removal to federal court. The case was removed improperly and eventually was remanded.[14]

The City and Valley each filed motions to dismiss Cleveland's amended complaint. The trial court denied the motions to dismiss as to the City and Valley, but granted dismissal of the claims against the individual City employee defendants.[15] The parties agreed that a hearing on Cleveland's request for preliminary injunctive relief would be combined with a trial on the merits.[16] All parties filed cross motions for summary judgment. Cleveland combined with its motion for summary judgment a request for a permanent injunction, or in the alternative, preliminary injunctive relief. The cross-motions for summary judgment and Cleveland's requests for injunctive relief were denied.[17]

After Cleveland presented its case to a jury, the trial court directed a verdict against Cleveland on its damage claims,[18] leaving claims for declaratory and

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[14] *Id.*

[15] *Id.*

[16] App. 104a.

[17] 105a *et seq.*

[18] App. 102a; 70a; 89a-91a; 94a-98a. The trial court directed a verdict on damages because it found that in Ohio, money damages against a city under 42 U.S.C. § 1983 for either a due process violation or an equal protection violation arising from a competitive bidding scenario are only available to the extent that injunctive relief is unavailable as a remedy. Because the court found Cleveland had not carried its burden of proof as to its

injunctive relief and attorneys fees for decision by the court. The trial court found in favor of Cleveland on its claims for violation of the Fourteenth Amendment Equal Protection and Due Process Clauses, and corresponding violations of 42 U.S.C. § 1983.[19] The trial court awarded declaratory relief as to those findings, and issued prospective permanent injunctive relief against the City's use of the unconstitutional race-conscious parts of its SBE program, which it found encouraged and pressured bidders to racially discriminate in the selection of subcontractors. The court also found Cleveland to be a prevailing party entitled to its attorney's fees and costs under 42 U.S.C. § 1988.[20] Cleveland filed a Motion for New Trial, which was denied.[21] Cleveland appealed the trial court's final judgment relating to the directed verdict on damages,

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request to enjoin construction of the then ongoing project by failing to prove the degree of completion of the drywall portion of the project in its case-in-chief, the court found that Cleveland was not entitled to damages. The court relied upon a recent decision from the Supreme Court of Ohio, *Cementech v. City of Fairlawn*, 109 Ohio St.3d 475, 849 N.E.2d 24 (2006). The holding of *Cementech*, which did not involve a claim under 42 U.S.C. § 1983, was that a disappointed bidder on a competitively bid contract who proves an abuse of discretion under Ohio law does not have a damage remedy, but only a remedy of injunctive relief. The Ohio First District Court of Appeals reversed the decision of the trial court, finding that 42 U.S.C. § 1983 contains no such limitation and remanded for a trial on damages. (App. 46a.)

[19] App. 69a *et seq.* and 56a *et seq.*

[20] *Id.*

[21] App. 54a.

and the City filed a cross-appeal. The Ohio First District Court of Appeals consolidated the appeals.

The Ohio First District Court of Appeals reversed the trial court's directed verdict on Cleveland's damage claims arising from equal protection and due process violations under 42 U.S.C. § 1983, and upheld the findings that the City violated Cleveland's rights to equal protection and due process and Cleveland's entitlement to attorney fees under 42 U.S.C. § 1988.[22]

The City filed a discretionary appeal to the Supreme Court of Ohio. The Supreme Court of Ohio accepted two of five issues presented for review relating to Cleveland's due process claims, but declined to accept jurisdiction over the lower courts' determinations on Cleveland's equal protection claims, which are the subject of the City's instant Petition for Writ of Certiorari. The two issues the Supreme Court of Ohio did accept for review were: (1) "Under Ohio law, a disappointed bidder for a City of Cincinnati public contract does not have a constitutionally protected property interest in that contract;" and (2) "A disappointed bidder for a public contract in Ohio cannot recover lost-profit damages in a 42 U.S.C. 1983 action alleging a deprivation of procedural due process."[23]

The Supreme Court of Ohio reversed in a decision issued on May 21, 2008, holding in its syllabus that:

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[22] App. 23a *et seq.*

[23] App. 13a-18a.

> No property interest is created when a City properly exercises its discretion and does not award a contract to a party deemed not to have complied with the requirements of the invitation to bid.[24]

Cleveland's Motion for Reconsideration was denied by the Supreme Court of Ohio on August 6, 2008.[25] The decision of the Ohio Supreme Court is the subject of a pending Petition for Writ of Certiorari filed by Cleveland and docketed by this Court on November 5, 2008.

REASONS FOR DENYING THE PETITION

I. The City's Race-Conscious SBE program Violates the Fourteenth Amendment's Equal Protection Clause and is Unconstitutional both on its Face and As Applied.

The findings of the trial court and the First District Court of Appeals that the SBE program contained provisions that encourage and pressure bidders to discriminate on the basis of race, triggering heightened scrutiny, are consistent with this Court's decision in *Adarand Constructors v. Pena*.[26] In *Adarand*, a subcontractor that was not awarded the guardrail portion of a federal highway contract due to

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[24] App. 2a-3a.

[25] App. 1a.

[26] 515 U.S. 200, 115 S. Ct. 2097 (1995); see also *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S. Ct. 2325, 2337-2338 (2003).

a compensation clause that provided financial incentives to a prime contractor in return for hiring disadvantaged subcontractors asserted violations of the Fifth Amendment's Equal Protection Clause. This Court held, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[27] The Court went on to say, "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[28] The Court ultimately held that to the extent regulations provide incentives to contractors to use race-based classifications, those regulations are subject to strict scrutiny.[29]

The City's assertion that its mandate for prime contractors to employ good faith efforts to racially discriminate in their selection of subcontractors has a "benevolent" purpose "to afford its citizens [including businesses owned by minorities and women] equal opportunities to do business on City contracts" is misguided and misses the point by putting the cart before the horse.[30] It is the very application of strict scrutiny which determines whether a sufficiently

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[27] *Adarand Constructors*, 515 U.S. at 223, 115 S. Ct. at 2111.

[28] *Id.* at 237, 2117.

[29] *Id.* at 224, 2097.

[30] Petitioner's Br. at 13.

important governmental interest is at stake in order to justify the government's use of racial classifications, as well as whether the professed governmental interest is the real purpose and motivation for the racial classifications. "We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[31] The professed "benevolent" purpose for the City's race-conscious SBE program does nothing to insulate it from strict scrutiny. The admission by the City below that it did have not a governmental purpose sufficient to survive strict scrutiny review leaves as the only remaining issue whether the SBE program is race-conscious. The SBE program is race-conscious and the lower court's properly held as much. Since the City admittedly lacks *any* sufficient governmental interest to justify its use of racial classifications, there is no set of circumstances under which the City could constitutionally apply the race-conscious provisions of its SBE program, and it is facially unconstitutional as well as unconstitutional as it was applied in this case.

II. The Lower Courts Properly Applied Strict Scrutiny to the City's SBE program.

Although the City tries to differentiate its SBE program from that at issue in *Adarand* by pointing out that whereas the challenged regulations in *Adarand* provided a financial incentive to bidders to grant a preference to disadvantaged subcontractors, that is not

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[31] *Grutter v. Bollinger*, 539 U.S. 306, 326 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

the case with the SBE program. However, the City misstates this Court's holding. First, *Adarand* does not stand for the proposition that only programs providing financial incentives are subject to strict scrutiny. Rather it stands for the general rule that race-based classifications in the realm of the awarding of public contracts are subject to strict judicial scrutiny. Second, the financial incentive is present in the City's SBE program as well. The financial incentive is the ultimate award of the contract and the avoidance of a time-consuming discrimination investigation and possible sanctions. If bidders want to maximize their chances of winning a public contract, they must retain the maximum practical participation of MBEs and WBEs as subcontractors as calculated by the City. If they do not, they risk losing the contract entirely and being subject to investigation for "discrimination." This is a financial incentive and pressure to discriminate on the basis of race and, as dictated by *Adarand*, triggers strict scrutiny.

As the Ninth Circuit has opined, a program like the City's SBE program is, "not immunized from scrutiny because [it] purports to establish 'goals' rather than 'quotas.' We look to the economic realities of the program rather than to the label attached to it."[32] The Sixth Circuit agreed, finding that, "although explicit racial preferences must withstand strict scrutiny, the government may not avoid searching review merely by

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[32] *Bras v. California Public Util. Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995).

invoking the phrase 'good-faith effort to solicit.'"[33] Further, the Sixth Circuit noted that, "where 'outreach' requirements operate as a sub rosa racial preference—that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors—courts must apply strict scrutiny."[34]

The lower courts correctly applied these principles in this case. The SBE program's Rules and Guidelines promulgated by the City pursuant to CMC § 323-31 explicitly state that the purpose of the SBE program is:

> to *ensure* that all bidders, vendors, and contractors . . . doing business with the City provide to businesses owned and controlled by racial minorities and ethnic minorities and women, opportunities to participate, *to the extent of their availability*, on contracts which are paid in whole or in part with monetary appropriations from the City of Cincinnati.[35]

The Rules and Guidelines are rife with additional race and gender-conscious provisions, most of which are never discussed or acknowledged in the City's Petition, including the following:

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[33] *Safecc Ins. Co. of America v. City of White House, Tenn.*, 191 F.3d 675, 691 (6th Cir. 1999).

[34] *Id.* at 692.

[35] App. 155a-156a.

* "In order to be considered as responsive, all bidders/proposers are required to use good faith efforts to promote opportunities for Minority and Women Business Enterprises to participate in and compete for, *to the extent of their availability*, contracting, subcontracting, and purchasing opportunities. Prior to the award of any contract related to construction services or professional services, the City *shall* evaluate each bidder's *documented efforts* to achieve participation of minority and women business enterprise firms."[36]

* "Upon its successful implementation, the Non-Discrimination program [a component of the SBE program] will result in utilization of minority and women-owned firms *to the extent of their* [governmentally specified] *availability*...."[37]

* "The City of Cincinnati, or its designated agent, will *evaluate* efforts made by bidders to promote opportunities for minority and women owned firms (MBE/WBE) to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding. ... If the *evaluation* determines that a bidder has *failed to achieve* levels of minority and women business enterprise participation as might be reasonable on the basis of objective data

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[36] App. 84a; 156a (emphasis added).

[37] App. 84a; 157a (emphasis added).

regarding *availability and capacity* of such business, the bidder *shall* be subject to an *inquiry* by the Office of Contract Compliance."[38]

* "Bidders or Offerors [operating under the Subcontracting Outreach program] *should be able* to include the participation of minority and female firms at the *levels of availability* determined in the City of Cincinnati Disparity Study."[39]

* "The SBDOCC [Small Business Division Office of Contract Compliance] will maintain a database to assist bidders in identifying minority and women business enterprises with capabilities commensurate with general contracting requirements. ... The list prepared from the database specifies which firms the City has determined to meet the requirements necessary for designation as minority and women business enterprises."[40]

* "Contractors *are required* to maintain documentation regarding the utilization of minority and women business enterprises, and all other pertinent records, during the performance of award of their contract."[41]

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[38] App. 84a-85a; 157a-158a (emphasis added).

[39] App. 85a; 161a (emphasis added).

[40] App. 158a.

[41] App. 159a (emphasis added).

One of the most significant race and gender-conscious provisions contained in the Rules and Guidelines is the good faith effort requirement that bidders:

> provide a *detailed description* of the techniques used to *obtain participation* of minority and women-owned business enterprises, including segmenting of the work into 2 or smaller units (areas for subcontracting), attending pre-bid conferences, soliciting specific minority and women-owned firms, soliciting trade associations that focus on minority and women-owned businesses, advertising efforts, and other methods used.[42]

Further, "[b]idders are required to show that they've made a good faith effort to get the *maximum practical participation* of minority and women-owned businesses on this project."[43] To prove that the bidders made the requisite "good faith efforts" to solicit MBEs and WBEs, bidders were required to submit Form 2007 "Statement of Good Faith Efforts"[44] with their bids containing detailed descriptions of the techniques used to obtain the maximum practical participation of MBEs and WBEs. A failure to achieve participation by the estimated availability of MBEs and WBEs as calculated by the City, which for the drywall contract was 13.09% MBEs and 1.05% WBEs, would trigger an

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[42] App. 85a; 163a (emphasis added).

[43] App. 86a-87a; 166a (emphasis added).

[44] App. 86a-87a; 185a-186a.

investigative inquiry. Specifically, the Rules and Guidelines state:

> If the bidder's utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder's utilization as being in compliance with the program. *The burden is on the bidder to explain the low utilization percentage.* If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then *the matter is turned over to the investigative unit for a discrimination investigation.*[45]

It is hard to imagine a program more race-conscious than the City's SBE program. The sheer volume of devices implanted within the SBE program to encourage and pressure bidders to racially discriminate when subcontracting the required portion of their contract is, quite simply, overwhelming. The only thing missing from the SBE program is an unambiguous statement that a bidder will not be awarded a contract by the City if that bidder fails to meet the City's "Availability Estimation" percentages for minority and female subcontractors (although it is certainly implied numerous times throughout the SBE program language). As is obvious from the City's

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[45] App. 163a-164a (emphasis added).

repeatedly pointing out that fact, the City believes that to be sufficient to render its SBE program "race-neutral" as a matter of law. That is simply an incorrect reading of this Court's very clear pronouncement in *Adarand* that all racial classifications are subject to strict scrutiny.

III. The Federal Courts have consistently Applied Strict Scrutiny to Programs that Utilize Encouragement and Pressure to Achieve the Use of Racial Preferences.

Although the City argues their holdings are dissonant, the federal cases cited by Cleveland below and which the City discusses in its Petition are entirely consistent, and apply with full force to the facts at issue here. Despite the City's claim to such, there is no "split of authority" among the federal courts requiring this Court's intervention.

In *Lutheran Church-Missouri Synod v. FCC*,[46] the United States District Court for the District of Columbia found that indisputable pressure to discriminate on the basis of race, even if discrimination is not mandatory, is enough to trigger strict scrutiny. Citing *Adarand*, the court found that it was not necessary that the racial preferences be mandatory to trigger strict scrutiny, stating "the Supreme Court treated the regulations as a racial classification and did not even pause to consider the suggestion that the absence of a compelled racial

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[46] 141 F.3d 344 (D.C. Cir. 1998) (*petition for rehearing en banc denied*, 154 F.3d 487 (D.C. Cir. 1998)).

preference makes strict scrutiny inapposite."[47] Indisputable pressure, even if discrimination is not compelled, is sufficient.

While the discrimination in *Lutheran* was not mandatory, the City's stated policy underlying the SBE program to provide MBEs opportunities to participate to the extent of their availability, by its plain language, is intended to ensure, not just suggest, that minorities be provided with opportunities sufficient to ensure their participation to the extent of their availability as calculated by the City. At the very least, the SBE program indisputably pressures bidders to discriminate, if not compels them to do so.

In *Monterey Mechanical v. Wilson*,[48] the Ninth Circuit found that a statute requiring general contractors to subcontract specified percentages of work to minority, women, and disabled veteran-owned subcontractors, or to demonstrate good faith efforts to do so, triggered strict scrutiny. The court found that, "though worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness. The scheme requires the bid solicitation in the context of requiring 'good faith efforts to meet [percentage] goals.'"[49] The court ultimately found that "the statute does not require set-asides, but it encourages them. A bidder can avoid disqualification by seeing to it that 23% of the work goes to the

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[47] *Lutheran Church-Missouri Synod*, 154 F.3d at 491.

[48] 125 F.3d 702 (9th Cir. 1997).

[49] *Id.* at 711.

designated classes, or showing that it tried to bring about that result." As such, the statute was race-conscious.

As found by the courts below, the SBE program contains a multitude of race-conscious provisions that encourage and pressure prime contractors to include a certain percentage of MBE and WBE subcontractor participation in their bids. The program provides benefits for those bidders who include MBEs at their estimated level of availability. Conversely, the program imposes burdens upon bidders who do not meet the subcontracting goals, or demonstrate good faith efforts to do so, including disqualification and potential investigations and sanctions to bidders who do not meet the specified MBE and WBE availability estimates.

And in *Safeco Insurance Company of America v. City of White House, Tennessee*,[50] the Sixth Circuit held that even if a regulation does not explicitly impose a specific numerical quota, but instead only requires "good faith efforts" to meet that goal, that alone would not insulate the regulation from strict scrutiny.[51] In that case, the Sixth Circuit found that the EPA's stated policy of awarding a "fair share" of sub-agreements to MBEs "implies that the outcome must meet an implicit goal – a goal derivable from one's

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[50] 191 F.3d 675 (6th Cir. 1999).

[51] *Id.* at 689, 691.

calculation of 'fair share,' but almost certainly non-zero."[52]

The same is true of the City's SBE program. The Rules and Guidelines use the word "ensure" to indicate explicitly, or at least implicitly, that bidders are required to utilize MBEs and WBEs to the extent of their availability as calculated by the City. The fact that the City calculates MBE and WBE availability and presents an "Availability Estimation" in the bid documents that the City states "should" be reflected in the subcontracted portion of a bidder's bid strongly implies that the City has established a goal that should be met. As was the case with the challenged regulation in *Safeco*, a "good faith" requirement to meet those goals is enough to trigger strict scrutiny.

The City asserts that this case should be reexamined in light of this Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[53] (*"Community Schools"*). However, the holding in *Community Schools*, in fact, supports Cleveland's position that the racially-conscious components of the SBE program are subject to strict scrutiny. *Community Schools* reaffirmed that, "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed

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[52] *Id.* at 690. See also *Bras v. Calif. Pub. Util. Comm.*, 59 F.3d 869 (9th Cir. 1995) (Rigid mandates are not a prerequisite to finding a racial classification.).

[53] 127 S. Ct. 2738 (2007).

under strict scrutiny"[54] and that "this Court has recently reiterated, however, that '*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.'"[55]

While the City cites Justice Kennedy's concurring opinion, which suggests that tracking the achievement of students from major racial and ethnic groups may not trigger strict scrutiny, as demonstrated by the Rules and Guidelines, the SBE program is not merely a tracking program. *Community Schools* does not erode the reality that the City's SBE program contains race-conscious provisions without the proper factual predicate to withstand strict scrutiny and as such, violates the Equal Protection Clause of the Fourteenth Amendment.

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[54] *Id.* at 2751 (citing *Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995)).

[55] *Id.* at 2764 (quoting *Johnson v. California*, 543 U.S. 499, 505-506 (2005); citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995)).

CONCLUSION

For the reasons above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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